



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 3

RIN 2900-AQ95

Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations regarding character of discharge determinations. VA proposes to modify the regulatory framework for discharges considered “dishonorable” for VA benefit eligibility purposes, such as discharges due to “willful and persistent misconduct,” “an offense involving moral turpitude,” and “homosexual acts involving aggravating circumstances or other factors affecting the performance of duty.” VA also proposes to extend a “compelling circumstances” exception to certain regulatory bars to benefits in order to ensure fair character of discharge determinations in light of all pertinent factors.

DATES: Comments must be received on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**.

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1064, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AQ95 – Update and Clarify Regulatory

Bars to Benefits Based on Character of Discharge.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1064, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Olumayowa Famakinwa, Policy Analyst, Regulations Staff (210), Compensation Service (21C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

I. Existing Character of Discharge Determination Process

Eligibility for most VA benefits requires that a former service member be a “veteran.” “Veteran” status is bestowed to former service members “who served in the active military, naval, or air service, and who [were] discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C. 101(2). Assuming the active service requirement is met, VA relies primarily on a former service member’s character of service designated by the Armed Forces to determine whether a former service member was separated from service “under conditions other than dishonorable.” See 38 U.S.C. 101(2), (18); see also 38 CFR 3.1(a), (d). The Armed Forces characterize discharge or release from service into one of five categories: honorable, under

honorable conditions (general), other than honorable (OTH), bad conduct (adjudicated by a general court or special court-martial), or dishonorable (or dismissal in the case of commissioned officers). The Armed Forces also has three categories of uncharacterized administrative separations: entry-level separation, void enlistment, or dropped from the rolls.

Section 3.12 of title 38, Code of Federal Regulations (CFR), provides the criteria used by VA adjudicators to determine character of discharge for purposes of benefit eligibility for former service members. First, regardless of the Armed Forces' characterization of service, there are six statutory bars to benefits noted in 38 U.S.C. 5303(a) and reiterated in paragraph (c) of 38 CFR 3.12. The statutory bars pertain to former service members discharged or released (1) as a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities; (2) by reason of the sentence of a general court-martial; (3) by resignation of an officer for the good of the service; (4) as a deserter; (5) as an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release; and (6) under OTH conditions as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days.

In addition, there are five regulatory bars to benefits provided in paragraph (d) of 38 CFR 3.12, pertaining to former service members who were discharged or released based on (1) acceptance of an undesirable discharge to escape trial by general court-martial; (2) mutiny or spying; (3) an offense involving moral turpitude, to include generally conviction of a felony; (4) willful and persistent misconduct; and (5)

homosexual acts involving aggravating circumstances or other factors affecting the performance of duty.

To determine eligibility for benefits, VA must evaluate the character of service for each period of active duty service. See 38 CFR 3.12(a). If the Armed Forces characterized the former service member's service as either "honorable," "under honorable conditions (general)," or as an uncharacterized administrative separation categorized as "an entry-level separation," VA considers a former service member to have met the character of discharge requirement, without further review of his or her service record, unless the discharge documents show a separation reason that is listed as a bar to benefits under 38 U.S.C. 5303(a) and 38 CFR 3.12(c). 38 CFR 3.12(a) and (k)(1).

If the Armed Forces characterized the former service member's service as dishonorable, the former service member would generally be deemed ineligible for any VA benefits based on that period of service, unless the insanity exception applied. See 38 CFR 3.12(b). The insanity exception applies to situations where the former service member was found to be insane at the time of the offense leading to his or her court-martial, discharge or resignation. See 38 CFR 3.354(b).

Generally, a discharge under dishonorable conditions will not bar a former service member from receiving VA benefits if that service member has another period of service which ended under honorable conditions for which the statutory bars would not apply—as VA benefits would be predicated on that honorable period of service. See 38 CFR 3.12(a); see also 38 U.S.C. 101(18); VAOPGCPREC 61-1991. In the case of commissioned or warrant officers who are discharged from an enlistment for the sole

purposes of accepting a commission, VA considers the entire period of service (i.e., from enlistment through commission period) as one continuous period of service with entitlement of VA benefits determined by the character of final termination of such period of active service. See 38 CFR 3.13.

If the character of service is denoted by the Armed Forces as under “other than honorable” conditions, as “bad conduct,” or as an “uncharacterized” separation (categorized as either “void enlistment” or “dropped from the rolls”), then VA must administratively assess eligibility for VA benefits and services and make a VA character of discharge determination on whether or not the period of military service is “under conditions other than dishonorable” for VA benefits purposes. See 38 U.S.C. 101(2); see also 38 CFR 3.12(a) and (k)(2) and (3). This VA character of discharge determination does not change the Armed Forces’ characterization of service and has no effect on the former service member’s military discharge status. Rather, VA’s determination is for VA benefits and services eligibility purposes only.

During VA’s administrative review of the service member’s character of discharge, VA examines the facts and circumstances that surround the Armed Forces’ characterization of service and assesses the statutory and regulatory bars to VA benefits. VA will request all available records, including service treatment and personnel records from the relevant military service department. VA will also send advance notice to the former service member, with an applicable response time limit for him or her to submit any evidence, contention, or argument surrounding facts and circumstances that led to the Armed Forces’ characterization of military service. When necessary, VA will resolve any reasonable doubt in favor of the former service member,

including when the service department provides limited records to VA as to the nature of the discharge and no statutory or regulatory bar exists.

A. Statutory Bars to Benefits

A former service member must be denied benefits, regardless of the Armed Forces' characterization of service, if the reason for separation from the period of service that benefits would be predicated upon falls within one of the six statutory bars. See 38 U.S.C. 5303(a). In situations where a former service member did not receive a discharge or release at the completion of an originally intended period of service because that individual agreed to an extension, VA looks to the satisfactory completion of that initial period to assess character of discharge for that period, even if the extension results in a dishonorable discharge. See 38 U.S.C. 101(18); see also 38 CFR 3.13(c). However, a statutory bar to benefits would apply as to a period of service to any former service member who was discharged or released under one of the six conditions enumerated in 38 CFR 3.12(c).

The statutory bar involving prolonged unauthorized absence of 180 consecutive days or more is the only conditional statutory bar to benefits. VA may consider whether "compelling circumstances" mitigate such a prolonged unauthorized absence. See 38 U.S.C. 5303(a). If compelling circumstances mitigate the absence, then the statutory bar to benefits would not apply. Congress left the issue of what constitutes compelling circumstances to VA's discretion. The statute does not define or give examples of what would rise to a compelling circumstance. To assist its adjudicators in reviewing

compelling circumstances, VA, through regulation, has provided circumstances to consider when contemplating compelling circumstances. See 38 CFR 3.12(c)(6)(i)-(iii).

First, VA adjudicators must review the length and quality of the service exclusive of time spent AWOL. See 38 CFR 3.12(c)(6)(i). Second, VA adjudicators must consider the reason for going AWOL, including family emergencies or obligations, similar types of obligations or duties owed to third parties, a person's age, cultural background, educational level, judgmental maturity, and how the situation appeared to the former service member (not how the VA adjudicator might have reacted). See 38 CFR 3.12(c)(6)(ii). Third, VA adjudicators must consider any hardships or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability. Id. Finally, VA adjudicators must consider a legal defense which would have precluded a conviction or valid charge under the Uniform Code of Military Justice (UCMJ) if the legal defense directly addresses the substantive issue of absence rather than procedures, technicalities or formalities. See 38 CFR 3.12(c)(6)(iii).

B. Regulatory Bars to Benefits

Independent of the statutory bars to benefits, VA must also consider whether a former service member's discharge was "under conditions other than dishonorable." 38 U.S.C. 101(2); Pub. L. 78-346, § 1503 (1944). Congress gave VA broad authority to consider discharges based on certain conduct as dishonorable. *Camarena v. Brown*, 6 Vet. App. 565, 568 (1994), *aff'd* 60 F.3d 843 (1995); 90 Cong. Rec. at 3077 (Mar. 24, 1944) (Sen. Clark) (for certain conduct, "the Veterans' Administration will have some

discretion with respect to regarding the discharge from the service as dishonorable”). Over 70 years ago, VA used this authority to adopt regulatory bars to benefits that are now enumerated in 38 CFR 3.12(d). See VA Regulations and Procedures (R&PR) 1064(A) (1946). Those regulatory bars were noted above and are further discussed below.

II. VA’s Proposed Regulatory Changes

In January 2016, VA received a petition for rulemaking from Swords to Plowshares (STP) requesting that VA amend 38 CFR 3.12(a) and (d) (pertaining to character of discharge), as well as 38 CFR 17.34 and 17.36 (pertaining to health care eligibility and enrollment). SWORDS TO PLOWSHARES, VA RULEMAKING PETITION TO AMEND REGULATIONS INTERPRETING 38 USC 101 (2) (December 19, 2015), available at <https://www.swords-to-plowshares.org/wp-content/uploads/VA-Rulemaking-Petition-to-amend-regulations-interpreting-38-USC-10122.pdf>. STP argued that VA’s character of discharge determination process lacked consistency and that the regulatory bars concerning moral turpitude, willful and persistent misconduct, and aggravating homosexual acts were outdated or vague.

VA is still considering appropriate changes for 38 CFR 17.34 and 17.36, particularly in light of the 2018 enactment of 38 U.S.C. 1720I. But VA has reviewed 38 CFR 3.12 and, particularly given that paragraph (d) has not been updated since 1980, VA is proposing changes. The goal of VA’s review is to ensure an updated as well as consistent approach in defining which former service members have been discharged “under conditions other than dishonorable.” See 38 U.S.C. 101(2); see also 38 CFR

3.1(d). As a part of its review, VA has researched the evolution of its current character of discharge policies, current military manuals, and the legislative intent behind 38 U.S.C. 101(2). In updating its regulatory framework for bars to benefits, VA proposes the following regulatory changes.

A. Homosexual Acts Involving Aggravating Circumstances

Though current § 3.12(d)(5) bars benefits for former servicemembers discharged for homosexual acts involving aggravating circumstances or other factors affecting the performance of duty, VA believes that this bar should apply to all sexual acts involving aggravating circumstances or affecting the performance of duty, regardless of the former service member's sexual orientation. Thus, VA will replace the word "homosexual" with "sexual" throughout this provision (which will be relocated to § 3.12(d)(2)(iii)).

B. Moral Turpitude and Willful and Persistent Misconduct

VA's Office of General Counsel (OGC) issued an opinion that defines "moral turpitude" as "a willful act committed without justification or legal excuse which gravely violates accepted moral standards and ... would be expected to cause harm or loss to person or property." VAOPGC 6-87 (July 27, 1987). OGC stated that a moral turpitude offense may include conduct that does not result in prosecution or conviction. *Id.* To the extent there has been any confusion or inconsistency in applying the definition of moral turpitude, we propose to incorporate OGC's explanation into the text of 38 CFR 3.12(d). However, we will omit the phrase "without justification or legal excuse"

because any determination on this matter will have to consider “compelling circumstances” as further discussed below.

As to willful and persistent misconduct, VA regulations already define “willful misconduct” as “an act involving conscious wrongdoing or known prohibited action.” 38 CFR 3.1(n). The act must involve deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences. 38 CFR 3.1(n)(1). A mere technical violation of police regulations or ordinances will not per se constitute willful misconduct. 38 CFR 3.1(n)(2).

“Persistent misconduct” is not defined by statute or regulation; however, the plain meaning of the term contemplates misconduct that is ongoing over a period of time, or conduct that recurs on more than one occasion. Merriam-Webster’s Collegiate Dictionary 865 (10th ed. 2000). VA already recognizes that an isolated offense does not qualify and that multiple offenses are not automatically deemed “persistent.” See M21-1 Adjudication Procedures Manual, Part III, Subpart v. Chapter 1, Section B, Topic 3, Block d, *“Additional Information on Discharges for Willful and Persistent Misconduct,”* <https://www.knowva.ebenefits.va.gov/>.

Nevertheless, to improve consistency in adjudications, VA proposes to provide a regulatory standard in determining “persistent misconduct.” VA would consider instances of minor misconduct occurring within two years of each other, an instance of minor misconduct occurring within two years of more serious misconduct, and instances of more serious misconduct occurring within five years of each other as “persistent.” The misconduct would not have to be of a similar nature, type, or offense to be considered “persistent.” (For example, disrespect toward a sentinel followed four days

later by leaving the scene of a vehicle accident would be considered “persistent” misconduct.)

VA already makes a distinction in its regulation between minor and more serious offenses in § 3.12(d)(4), and accepts that mere technical violations of police regulations or ordinances are not, by themselves, willful misconduct, § 3.1(n)(2). But to bring consistency to the use of that term, “minor misconduct” would be defined as “minor offense” is in the Manual for Courts-Martial United States (MCM): “[o]rdinarily ... an offense for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial.” MCM Part V, para.1.e (2019). Beyond that general rule, the MCM states that determining whether an offense is minor can depend on several factors (circumstances, age, etc.), but VA will account for those factors in § 3.12(e), as discussed below. Thus, it would be consistent with military law for VA to adopt a definition of minor misconduct based on the MCM’s general definition of minor offense (which, notably, examines the maximum sentence imposable—not the sentence actually given). We believe that reliance on the MCM will bring consistency to determinations in this realm and that use of the MCM is appropriate considering that the offenses and misconduct considered would have occurred when the former service member was under the jurisdiction of the military.

The definition of “persistent” is derived from the statutes of limitations for punishment in the MCM and the UCMJ. For nonjudicial punishment, which is typically imposed for acts or omissions that are minor offenses, the statute of limitations is generally two years. *Id.* at Part V, para. 1.f(4); see also 10 U.S.C. 843(b)(3). For judicial punishments, the UCMJ generally provides a five year statute of limitations

(though there is no limitation for murder, rape, sexual assault, AWOL or missing movement in time of war, or any other offense punishable by death). See 10 U.S.C. 843(a)-(b). Just as the military will generally no longer prosecute a minor offense after two years or other more serious offenses after five years, VA will consider minor offenses occurring more than two years apart and other more serious offenses occurring more than five years apart as not meeting the persistence standard. That said, we note that some more serious offenses may also meet the standard of “moral turpitude” and therefore warrant a bar of benefits under that provision.

It is important to address how AWOL would relate to this definition of “willful and persistent misconduct.” Again, VA would consider the MCM, which provides maximum punishments of dishonorable discharge for certain types of AWOL (e.g., absence from unit for more than 30 days, whether terminated by apprehension or not), and lesser punishment for other types of AWOL (e.g., absent from guard or watch, even with intent to abandon, or absent with intent to avoid maneuvers or field exercises). See MCM Part IV, para. 10.d (Article 86.d). The following chart demonstrates how VA will consider AWOL for the purposes of determining willful and persistent misconduct:

Type of AWOL	Minor Misconduct	Serious Misconduct
Failing to go, going from appointed place of duty	X	
Absence from unit, organization, or other place of duty:		
For not more than 30 days	X	
For more than 30 days		X
For more than 30 days and terminated by apprehension		X
Absence from guard or watch	X	
Absence from guard or watch with intent to abandon	X	
Absence with intent to avoid maneuvers or field exercises	X	

This approach would provide VA with more consistent outcomes in applying the willful and persistent misconduct bar to cases involving AWOL.

C. Acceptance of an Undesirable Discharge to Escape Trial by General Court-Martial

VA proposes to replace the term “undesirable discharge” in current § 3.12(d)(1) with “a discharge under other than honorable conditions or its equivalent” to conform to the terminology that has been used since 1977. See Pub. L. 95-126 (1977). VA also proposes to replace the phrase “to escape” in current § 3.12(d)(1) with “in lieu of” to conform to the terminology that service departments currently use and to avoid ascribing motivation or stigma to a former service member’s decision to accept a discharge rather than to proceed to trial by a general court-martial.

D. Compelling Circumstances

As noted above, the statutory bar involving prolonged unauthorized absence of 180 consecutive days or more is the only conditional statutory bar to benefits. If “compelling circumstances” mitigate the AWOL, then the statutory bar to benefits would not apply.

VA proposes to extend this “compelling circumstances” exception to three current regulatory bars to benefits: sexual acts involving aggravating factors, willful and persistent misconduct, and offenses involving moral turpitude. Thus, VA will move the list of factors for consideration in a “compelling circumstances” analysis (currently located at § 3.12(c)(6)(i)-(iii)) to § 3.12(e). This list is not exhaustive, so VA adjudicators

will have the necessary flexibility to deal with unique situations that may arise in reviewing character of discharge determinations—but many of these factors may not be pertinent in a given case, depending on the conduct at issue. (For example, it is difficult to imagine family obligations being used as a compelling circumstance excusing murder or aggravating sexual acts.) Compelling circumstances, as applied, will be decided on a case-by-case basis.

VA will continue to exclude application of the “compelling circumstances” exception to those discharged for mutiny or spying because of the seriousness of these offenses, which require forfeiture of all accrued or future gratuitous benefits per 38 U.S.C. 6104. Likewise, VA will not consider this exception for those who accept an OTH (or equivalent) discharge in lieu of trial by general court-martial. Armed Forces procedures ensure that the service member has full knowledge of the consequences of such a separation, including the “[l]oss of veterans’ benefits.” See Army Regulation (AR) 635-200, Chapter 10-2.a(9); Air Force Instruction (AFI) 36-3208, Chapter 4, Figure 4.1, ¶ 3; MILPERSMAN 1910-106, 2.a, ¶ 4; MARCORSEPMAN 1900.16, ¶ 6419.3.d(3); and COMDTINST M1000.4, 1.A.5.d(1). Armed Forces procedures ensure that the service member is not coerced into accepting this type of separation and that the individual is offered an opportunity to consult legal counsel prior to agreeing to such a separation. See, e.g., AR 635-200, Chapter 10-2; AFI 36-3208, Chapter 4.3.3; MILPERSMAN 1910-106, 2.a, ¶ 1-2. In addition, certain military branches provide medical examinations while processing these applications for discharge, to ensure that the service member is capable of providing informed consent to this type of separation. See, e.g., AR 635-200, Chapter 10-6; AFI 36-3208, Chapter 4.7; MILPERSMAN 1910-

106, 2.d; and COMDTINST M1000.4, 1.A.5.d(3). Moreover, accepting a discharge in lieu of trial by general court-martial does not always result in an OTH discharge; a former service member can receive a general discharge, an entry-level separation, or even an honorable discharge. See, e.g., AR 635-200, Chapter 10-8; AFI 36-3208, Chapter 4.2; MILPERSMAN 1910-106, 3.a. In such cases, the regulatory bars to benefits would not even apply. 38 CFR 3.12(a), (k)(1). Finally, this regulatory bar applies only to former service members who could have been tried by a general court-martial, not a special court-martial; and since the sentence of a general court-martial is a statutory bar to benefits, we do not believe that accepting a discharge in lieu of such a trial should result in the possibility of a different outcome.

III. Proposed Regulatory Amendments

Pursuant to the above discussion, VA proposes the following amendments to § 3.12. VA would amend the title to “Benefit eligibility based on character of discharge.” This change would reflect the fact that VA does not have the authority to alter a characterization of service issued by the Armed Forces and that VA utilizes the designation to determine basic VA benefit eligibility.

VA would amend paragraph (a) by adding the descriptive header “General rule” and rewording the section to read in the affirmative.

VA would amend paragraph (b) to add the descriptive header “Insanity exception,” add a sentence cross-referencing 38 CFR 3.354’s definition of insanity, and make non-substantive amendments for clarity.

VA would amend paragraph (c) to add the descriptive header “Statutory bars to benefits.” In paragraph (c)(1), VA will make a minor edit to make “lawful order” plural so

that it accurately reflects the text of 38 U.S.C. 5303(a). In paragraph (c)(6), VA will add a reference to 38 U.S.C. 5303(a) in the first sentence. VA would also divide the language of current paragraph (c)(6) into two subparagraphs, with descriptive headers and other non-substantive changes. VA would move current (c)(6)(i)-(iii) regarding “compelling circumstances” to new paragraph (e).

VA would amend paragraph (d) to add the descriptive header “Regulatory bars to benefits.” In addition, VA would add a new format based on whether the “compelling circumstances” exception is or is not applicable. As noted above, the phrase “Acceptance of an undesirable discharge to escape trial” in current paragraph (d)(1) will be replaced with “Acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial” in new paragraph (d)(1)(i).

New paragraph (d)(2) would contain the updated and clarified regulatory bars for moral turpitude, willful and persistent misconduct, and sexual acts involving aggravating circumstances or other factors affecting performance of duty.

New paragraph (e) would provide guidance concerning the “compelling circumstances” exception. The circumstances listed in (e)(1) and (2) are expansions upon current paragraphs (c)(6)(i) and (ii), while the circumstances listed in (e)(3) will substantively replicate current paragraph (c)(6)(iii), with minor wording changes to reflect the fact that this language can now be applied to misconduct outside the AWOL context.

The remaining paragraphs of § 3.12 are provided descriptive headers and updated cross-references after the addition of new paragraph (e).

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866.

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date."

This proposed rule is expected to be an Executive Order 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the rule's economic analysis.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). The anticipated costs of this regulatory

action are directly and only attributed to VA's internal processing and budgetary appropriations. There are no small entities involved or impacted by this regulatory action. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This action contains provisions affecting a collection of information, at 38 CFR 3.151, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3521). There are no new collections of information associated with this rule, but there will be an increase in the number of respondents associated with an already approved Office of Management and Budget (OMB) control number. The information requirement for 38 CFR 3.12 is currently approved by the Office of Management and Budget (OMB) and has been assigned control numbers 2900-0747 and 2900-0004. This rulemaking would increase the number of respondents from the existing information collection requirements associated with 38 CFR 3.12 by increasing the number of claims for

benefits submitted under 38 CFR 3.151. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3521), while the actual OMB control number will remain in existence due to other information collections on the same OMB control number that are approved and active, it increases the number of respondents for the approved OMB control number, 2900-0747. This would result in an increase of 11,682 estimated annual burden hours and an annual cost of \$121,590.15. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA will submit this information collection amendment to OMB for its review. Notice of OMB approval for this information collection will be published in a future Federal Register document.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.101, Burial Expenses Allowance for Veterans; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans.

Signing Authority

The Secretary of Veterans Affairs approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Acting Chief of Staff, Department of Veterans Affairs, approved this document on May 21, 2020, for publication.

Jeffrey M. Martin,
*Assistant Director,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.*

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 3 as set forth below:

PART 3 – ADJUDICATION

Subpart A – Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Amend § 3.12 as follows:

- a. Revise the section heading.
- b. Revise paragraphs (a), (b), (c) introductory text, (c)(6), and paragraph (d).
- c. Redesignate paragraphs (e) through (k) as paragraphs (f) through (l).
- d. Revise redesignated paragraphs (f), (g), (h) introductory text, (i) introductory text, and (j).
- e. Add new paragraph (e).
- f. Add a paragraph heading at the beginning of newly redesignated paragraph (k).

The revisions and additions read as follows:

§ 3.12 Benefit eligibility based on character of discharge.

(a) *General rule.* If the former service member did not die in service, then pension, compensation, or dependency and indemnity compensation is payable for claims based on periods of service that were terminated by discharge or release under

conditions other than dishonorable. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) *Insanity exception.* No bar to benefits under this section shall be applied if VA determines that the former service member was insane at the time he or she committed the offense(s) leading to the discharge or release under dishonorable conditions. (38 U.S.C. 5303(b)). Insanity is defined in §3.354.

(c) *Statutory bars to benefits.* Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities.

* * * * *

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days (38 U.S.C. 5303(a)).

(i) *Compelling circumstances exception.* This bar to benefit entitlement does not apply if compelling circumstances mitigate the prolonged unauthorized absence, as discussed in paragraph (e) of this section.

(ii) *Applicability prior to October 8, 1977.* This statutory bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (i) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. "Basic eligibility" for purposes of this paragraph means either a Department of Veterans Affairs determination that an other than honorable discharge

was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (i) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits.

(d) *Regulatory bars to benefits.* Benefits are not payable where the former service member was discharged or released under one of the following conditions listed in (d)(1) or (2) of this section.

(1) Compelling circumstances exception is not applicable for:

(i) *Discharge in lieu of trial.* Acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial by general court-martial.

(ii) *Mutiny or espionage.* Mutiny or spying.

(2) Compelling circumstances exception is applicable for:

(i) *An offense involving moral turpitude.* For purposes of this section, “an offense involving moral turpitude” means a willful act that gravely violates accepted moral standards and would be expected to cause harm or loss to person or property. Minor misconduct, as defined in paragraph (d)(2)(ii) of this section, will not be considered an offense involving moral turpitude.

(ii) *Willful and persistent misconduct.* For purposes of this section, instances of minor misconduct occurring within two years of each other are persistent; an instance of minor misconduct occurring within two years of more serious misconduct is persistent;

and instances of more serious misconduct occurring within five years of each other are persistent. For purposes of this section, minor misconduct is misconduct for which the maximum sentence imposable pursuant to the Manual for Courts-Martial United States would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial.

(iii) *Sexual acts involving aggravating circumstances or other factors affecting the performance of duty.* Examples include child molestation; prostitution or solicitation of prostitution; sexual acts or conduct accompanied by assault or coercion; and sexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

(e) *Compelling circumstances exception.* The bar to benefits for prolonged AWOL under paragraph (c)(6) of this section and the three types of misconduct described in paragraph (d)(2) of this section will not be applied if compelling circumstances mitigate the AWOL or misconduct at issue. The following factors will be considered in a determination on this matter:

(1) Length and character of service exclusive of the period of prolonged AWOL or misconduct. Service exclusive of the period of prolonged AWOL or misconduct should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(2) Reasons for prolonged AWOL or misconduct. Factors considered are as follows:

(i) Mental impairment at the time of the prolonged AWOL or misconduct, to include a clinical diagnosis of, or evidence that could later be medically determined to demonstrate existence of, posttraumatic stress disorder (PTSD), depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, cognitive disabilities, and co-morbid conditions (i.e., substance use disorder and other mental disorders).

(ii) Physical health, to include physical trauma and any side effects of medication.

(iii) Combat-related or overseas-related hardship.

(iv) Sexual abuse/assault.

(v) Duress, coercion, or desperation.

(vi) Family obligations or comparable obligations to third-parties.

(vii) Age, education, cultural background, and judgmental maturity.

(3) Whether a valid legal defense would have precluded a conviction for AWOL or misconduct under the Uniform Code of Military Justice. For purposes of this paragraph, the defense must go directly to the substantive issue of absence or misconduct rather than to procedures, technicalities, or formalities.

(f) *Board of corrections upgrade.* An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of 10 U.S.C. 1552 is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(g) *Discharge review board upgrades prior to October 8, 1977.* An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed

in paragraphs (i)(1), (2), and (3) of this section by a discharge review board established under 10 U.S.C. 1553, sets aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(h) *Discharge review board upgrades on or after October 8, 1977.* An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d), but not under paragraph (c) of this section provided that:

* * * * *

(i) *Special review board upgrades.* Unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (h) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

* * * * *

(j) *Overpayments after October 8, 1977, due to discharge review board upgrades.* No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (i) of this section which would not be awarded under the standards set forth in paragraph (h) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set

forth in paragraph (h) of this section, or April 7, 1978, whichever is the earliest.

Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(k) *Overpayments after October 8, 1977, based on application of AWOL statutory bar.*

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